IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION(MAIN) NO. 62 OF 2007

Ricardo Nazareth,
Owner of Chin Chong
Restaurant & Bar,
Corlim – Goa. ... Applicant

versus

1. Joao Francisco D'Souza
   R/O Flat No. F-2,
   Harmony Apartment,
   Porvorim, Bardez-Goa.

2. State
   (Represented by Old Goa
   Police Station) ... Respondents

Mr. P. V. Vengurlekar, Advocate for the Applicant.

Mr. A. Monteiro, Advocate for the Respondent No.1.

Ms. Winnie Coutinho, Public Prosecutor for the Respondent No.2.

CORAM : N. A. BRITTO, J.

DATE : 19TH APRIL, 2007.

ORAL ORDER

Heard the learned Counsel on behalf of both the parties.

2. The dispute between the applicant and the respondent(i.e. respondent no.1) is as regards possession of House No.274 situated in Survey No.20/3 of Village Malar, Tiswadi, Goa, admittedly belonging to

Francisco V. D'Souza, and, the challenge in this petition filed under Section 482 of the Code of Criminal Procedure, 1973(Code, for short) is to the Order dated 9-11-2006 of the learned SDM, Panaji, as confirmed by the learned Additional Sessions Judge by Order dated 3-2-2007, by which the learned SDM has directed the applicant(party no.2) to hand over the possession of the said house to the respondent(party no.1).

3. Some more facts are required to be stated to dispose of this petition. The case of the respondent at whose behest the proceedings were initiated by the learned SDM under Section 145 of the Code, was that he was the tenant of the said house by virtue of Agreement dated 3-7-2001 executed between him and the said Francisco V. D'Souza and that he was residing in the said house until 3-7-2001 when he shifted his residence to Porvorim but his employee particularly one Vishwanath Reddy continued to reside in the said house but on 29-5-2006 in the absence of the said Vishwanath Reddy the applicant forcibly entered the house by breaking the locks and kept out the belongings of the said Vishwanath Reddy and when he questioned the applicant, the applicant threatened him with dire consequences in case the respondent came again in the said house and further threatened him that he should not complain to the Police but he filed a complaint on the same day to the Police alleging that he was forcibly and illegally dispossessed of the suit house by the applicant.

4. On the other hand, it was the case of the applicant that the respondent had filed an application for declaration of mundkarship against

the said Francisco V. D'Souza which was dismissed by the Mamlatdar and the applicant was thereafter put in possession of the said house by the said Francisco V. D'Souza pursuant to a Leave and License Agreement dated 15-12-2005. According to the applicant at a time when he was put in possession on 15-12-2005, the house was vacant.

5. The learned SDM after receipt of the application from the respondent sent the same for inquiry and report to Old Goa Police Station and after the receipt of a report dated 2-6-2006 issued preliminary Order in terms of Section 145(1) of the Code, and, presumably after the receipt of the said preliminary Order that the parties appeared before the SDM on 20-6-2006 but neither of them filed a written statement of their respective claims. The respondent did not file any written statement either on 20-6-2006 or thereafter at any time presumably because he had approached the learned SDM with the said application which contained his claim. The applicant filed an application dated 4-7-2006 contending that there was no breach of peace and therefore the proceedings be dropped but the said application filed by the applicant did not find favour with the learned SDM who was pleased to dismiss the same by Order dated 25-7-2006 and fixed the case for arguments on 1-8-2006, but the proceedings appeared to have been resumed on 7-8-2006 and thereafter some adjournments were sought and on 26-9-2006 arguments were heard on dispossession and the impugned Order dated 9-11-2006 was passed and the proceedings were presumably closed. The copy of the roznama produced on behalf of the respondent, does not show any further date, having been fixed by the learned SDM. Parties agree that

the applicant filed his written statement only on 26-9-2006 when the arguments were heard.

6. Initially, it was contended on behalf of the respondent, that the impugned Order dated 9-11-2006 was an interim Order and not a final Order passed by the learned SDM but now it is contended on behalf of the respondent that the impugned Order is a final Order passed in terms of sub-section(6) of Section 145 of the Code. On behalf of the applicant, initially it was contended that the learned SDM did not have any power to pass an interim Order and only a final Order could be made by the SDM after the inquiry contemplated by sub-section(4) of Section 145 of the Code was completed. On behalf of the applicant, it is next submitted that the impugned Order cannot be considered to be a final Order because no inquiry has been held and a final Order could be made in terms of sub-section(4) of Section 145 only after the inquiry is completed. On behalf of the respondent, it is submitted that since the parties had not shown their desire to lead any further evidence and all the documents were on record, the learned SDM could have passed the final Order. On behalf of the applicant reliance was placed on **R. H. Bhutan**i v. **Ms. Man. J. Desai and others** (AIR 1968 SC 1444), **Bhinka and others** v. **Charan Singh**(AIR 1959 SC 960) and **Ashok Kumar Ghose** v. **Khetra Mohan Dass**(1991 CRI.L.J. 1769). On behalf of the respondent reliance has been placed on **Shanti Kumar Panda** v**. Shakuntala Devi**(2004 SCC(Cri) 320).

7. Section 145 of the Code deals with the procedure to be followed where there is a dispute concerning land or water which is likely to cause breach of peace. Sub-Section(1) thereof deals with the preliminary order to be made by an Executive Magistrate stating the grounds of being satisfied that such a dispute exists and requiring the parties concerned to attend his Court on a specified date and time so as to file written statements. It is well settled now that this satisfaction which a Magistrate records under Section 145(1) is his subjective satisfaction which has to be arrived at on the basis of materials placed before him and once that discretion is exercised it is not permissible for the superior Court in exercise of its revisional jurisdiction to go into the question of sufficiency of material which had satisfied the Magistrate. In this context, it may be stated that the Order of the learned SDM dated 25-7-2006 had attained finality as there was no challenge to the same, on behalf of either of the parties. It is also equally well settled that it is not necessary that the apprehension of the breach of peace should continue to exist till the time of passing of the final Order, as stated by the Apex Court in the case of **R. H. Bhutani** v. **Miss Man. J. Desai and others**(supra).

8. Sub-Section(2) of Section 145 of the Code defines the expression “land or water” and sub-section(3) deals with the manner of service of the Order under sub-section(1) of Section 145. Sub-Section(4) of Section 145 provides for the manner of inquiry to be held after the parties are called upon to file their respective claims as regards the fact of actual possession. It provides that the Magistrates shall without reference to the merits or claims of any of the parties, to a right to possess the subject of

dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any, as he thinks necessary, and, if possible, decide whether any and which of the parties was, at the date of the Order made by him, under sub-section(1) in possession of the subject of dispute(emphasis supplied). The proviso below sub-section(4) of Section 145 also provides for fictional date of possession i.e. in case any party was forcibly and wrongfully dispossessed within two months next before the date of the report of a Police Officer was received or after that date and before the date of his Order, to treat such party so dispossessed, as if that party had been in possession on the date of his Order under sub-section(1). Sub-Section(5) of Section 145 which deals with a right of a party to bring to the notice of the Executive Magistrate that no dispute which is likely to cause breach of peace exists and further provides that in such a situation the Magistrate is at liberty to cancel his Order, etc. Sub Clause(a) of sub-section(6) of Section 145 of the Code provides that if the Magistrate decides that one of the parties was, or should under the proviso to sub-section(4) be treated as being, in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction; and when he proceeds under the proviso to sub-section(4), may restore to possession the party forcibly and wrongfully dispossessed. Clause (b) of sub-section(6) of Section 145 deals with the manner of service of order and which is again as provided by sub-section(3) of Section 145 of the Code.

9. The object behind Section 145 is to provide for a summary inquiry in respect of possession of immovable property. The Section does not provide for any further summary inquiry so as to enable an Executive Magistrate to pass an interim order and any order to be passed could be only an order contemplated by sub-section(6), after an inquiry and after the parties are given an opportunity to produce their evidence, in terms of sub-section(4) of Section 145 of the Code. In the circumstances, therefore, by no stretch of imagination it could be said that the impugned order was an interim order or an order made pending an inquiry under sub-section(4) of Section 145 of the Code since Section 145 gives no such power to an Executive Magistrate to make such interim order deciding as to which of the parties should be entitled to possess or the subject matter of dispute. Needless to observe, before initiating proceedings under Section 145 of the Code, the Magistrate must be satisfied of two conditions, namely that (i) a dispute regarding land or water or the boundaries thereof exists and (ii) such dispute is likely to cause a breach of peace and once he has been so satisfied with these twin conditions, the Section further requires him to pass a preliminary order under sub-section(1) of Section 145 of the Code and the only next step he has to take is to proceed with an inquiry under sub-section(4) of Section 145 and then pass a final order under sub-section(6) thereof. I have already noted that the applicant had filed his written statement and presumably without any objection from the respondent, as no such objection is seen recorded in the proceedings, only on 26-9-2006 on the very day the arguments were heard before passing the impugned Order. On behalf of the respondent, it is submitted that an endorsement was made on the said written statement filed

by the applicant that the same should not have been taken on record. However, the fact remains that at no stage did the learned SDM give an opportunity to either of the parties to produce evidence as they may have desired to produce in support of their respective claims and any order made without giving such opportunity, has got to, be set aside as being violative of the very procedure set out by sub-section(4) of Section 145 and denial of a valuable right to produce evidence in support of their claims. As already stated, Section 145 of the Code does not contemplate any interim Order being made pending the completion of an inquiry under sub-section(4) of Section 145 of the Code and the final order to be made in terms of sub-section(6) thereof. As already stated Section 145 of the Code itself provides for a summary inquiry and there could not be any interim order pending such summary inquiry, deciding the rights of the parties at interim stage. Section 145 also does not contemplate that a final order would be made by depriving either of the parties from producing such evidence as they may desire to produce. It is rather unfortunate that the applicant did not seek an opportunity, after he filed the written statement of his claim on 26-9-2006 to produce evidence, but a bare reading of sub-section(4) of Section 145 makes it more than clear that it is the duty of an Executive Magistrate not only to hear the parties but also to receive all such evidence as they may produce and take further evidence if any, as he thinks necessary. A final order which is made in terms of sub-section(6) without any inquiry or affording an opportunity to lead evidence to support their respective claims in terms of sub-section(4) has got to be held as in breach of mandatory procedure and hence illegal and therefore deserves to be set aside.

10. Consequently, the impugned Orders dated 9-11-2006 and 3-2-2007 are are hereby set aside and the learned Magistrate is hereby directed to follow the provisions of sub-section(4) of Section 145 of the Code and give an opportunity to both the contesting parties to produce all such evidence as may be produced by them in support of their respective claims and only thereafter proceed to pass the final order as contemplated by sub-section(6) of Section 145 of the Code.

11. In view of the above, the petition succeeds. Both the aforesaid orders are hereby set aside. Both the parties are hereby directed to remain present before the SDM for an inquiry under sub-section(4) of Section 145 of the Code on 30th instant at 2.30 p.m. The learned Magistrate is directed to dispose of the inquiry as early as possible and in any event within a period of six months.

N. A. BRITTO, J.

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